NO. 42376-6-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

DONALD DAVID MCKNIGHT,

Appellant.

BRIEF OF APPELLANT

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Assignment of Error

1. The trial court denied the defendant his right to a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, when it failed to grant a motion for severance of counts and thereby allowed the state to present inadmissible, unfairly prejudicial evidence of similar bad acts.

2. Trial counsel's failure to object when the state elicited inadmissible, prejudicial hearsay denied the defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment.

3. The trial court denied the defendant due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, when it sentenced him for an offense unsupported by substantial evidence.

Issues Pertaining to Assignment of Error

1. Does a trial court deny a defendant the right to a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, if fails to grant a motion for severance of counts and thereby allows the state to present inadmissible, unfairly prejudicial evidence of similar bad acts?

2. Does a trial counsel's failure to object when the state elicits inadmissible, prejudicial hearsay deny a defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment?

3. Does a trial court deny a defendant due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, if it sentences him for an offense unsupported by substantial evidence?

STATEMENT OF THE CASE

Factual History

On January 30, 2010, Jennifer Herrman woke up to the sound of her puppy barking in its cage in the front room of the small house she shares with her 3-year-old son at 541 21st Avenue in Longview. RP 33-35.[1] Upon going out to investigate, she saw a man about 5'6" in height in a dark work coat going through a drawer in the kitchen. RP 38-42. At the time it was dark. *Id.* Assuming the person was her boyfriend, she asked what he was doing. *Id.* When she spoke, the person looked up, and she noticed that he had a small LED type flashlight, his hood was up, and he was wearing a backpack. RP 42-45. Realizing that this person was not her boyfriend, she yelled out "what are you doing in my house, what are you doing in my home?" *Id.* When she said this, the intruder ran at her with a yellow bar in his unraised hand as if to strike her with it. *Id.* As he got close, she recognized him as someone she had previously seen, and twice told him that she knew who he was. RP 46-50

When Ms Herrman said "I know who you are," the intruder turned to run. RP 50-56. As he did, she again saw his backpack. *Id.* Worried that the backpack might contain her purse and rent money, which she had left out, she

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[1]The record on appeal includes three contentiously numbered volumes of verbatim reports, referred to herein as "RP [page #]."

grabbed the backpack, noting that it seemed full of items. *Id.* As she did, she yelled out, "What did you take?" *Id.* The intruder replied "nothing." *Id.* At this point Ms Herrman pulled harder on the backpack and the intruder responded by hitting Ms Herrman on the left side her face, knocking her to the floor. *Id.* Ms Herrman later stated that it felt like it knocked her out temporarily. *Id.* Once on the ground, she heard her son crying and saw him standing in the living room. RP 53-56. She also saw the yellow club close to her head. *Id.* Upon seeing the club, she picked it up and began hitting the intruder with it and chasing him out of the house. *Id.* As the intruder ran through the living room, he knocked her young son to the ground. RP 57-60.. The intruder then ran out the side door with Ms Herrman in pursuit. *Id.* Once outside, Ms Herrman stopped chasing the intruder, yelled at her neighbor to call "911" and then returned to her house to comfort her son, who was hysterical. *Id.*

Once the police arrived, Ms Herrman told them what had happened, adding the fact that when the intruder ran away, she saw that he was wearing a coat that appeared to be a few sizes too big. RP 53-56. During this interview, the responding officer found the yellow bar on the floor. RP 108-110. It appeared to be part of a mechanism used to lock steering wheels in place. *Id.* He also found a lawn chair next to an open back window where the intruder had apparently entered the house. RP 98-102. Although Ms

Herrman did not know the name of the intruder, she said that she did recognize him. RP 61-62. A few days later, while discussing the matter with her boyfriend, she said the name "Danny" and remembered that the intruder's name was Donny Abdich, who also went by the name of Donald McKnight. RP 68-72. Upon remembering this fact, she called the investigating officer, who got a picture of the defendant, put it in a photo montage, and showed it to Ms Herrman. RP 68-72, 108-110. She identified the defendant out of the montage as the intruder. *Id.*

A number of weeks after the burglary of her home, Ms Herrman encountered the defendant and his sister at a local casino called the Cadillac Ranch. RP 68-72. Ms Herrman later told a defense investigator that when she saw the defendant, she realized that she might well have misidentified the defendant as the intruder. RP 293-300. The defendant's sister claimed that Ms. Herrman approached the defendant, apologized, and said "Donny it wasn't you and I'm sorry for blaming you. I thought it was you but it was not." RP 272. However, at trial Ms Herrman denied ever making such a statement to the defendant in front of his sister, or to making such a statement to the defense investigator. RP 78-79.

On April 12, 2011, about three and one-half months after the burglary at Ms Herrman's house, a person by the name of Brad Lowe was at the "Indy Way" Chevron station in Longview where he was working. RP 205-209. At

about 10 pm, his friend Benjamin Campbell stopped by to see him, and a co-worker of Mr. Lowe's by the name of Ashley Rae asked Mr. Lowe and Mr. Campbell if they would run over to her house and pick up an item she had forgotten. RP 123-127, 205-206. Ms Rae's house was only a couple miles away, and she gave Mr. Lowe the key to the front door. *Id.*

Once Mr. Lowe and Mr. Campbell arrived at Ms Rae's house they walked up to the front door and tried to open it with the key. RP 125-127, 205-209. However, while the key turned the lock, the door appeared stuck. *Id.* They then pushed on the door, and heard a "clunk" sound as it opened. They also heard noises from within that they thought might be a dog. *Id.* Once inside, they found that someone had jammed a knife in the front door frame, as well as in the back door frame. *Id.* Although it was dark, when they entered, they saw a person wearing dark clothes turn and run. RP 207-209. Mr. Campbell believed the person to be about 6 foot tall. RP 128-131. Mr. Lowe believed that the person was white, had short hair, and was wearing a loose, dark jacket. RP 205-209. Both saw this person throw a bag out an open window before jumping out himself and making his escape. RP 128-131, 207-209.

After the intruder ran away, Mr. Lowe and Mr. Campbell called the police as well as Mrs. Rae. RP 210-212, 218-224. They both arrived within a few minutes. RP 145-149, 218-224. An inspection of the house revealed

two backpacks that did not belong to Ms Rae, as well as a number of other items that did not belong to Ms Rae such as papers, a flashlight, a shoe, and tools, strewn about the floors of the house. RP 131-132, 161-173, 220-226. One of these backpacks contained various items of paperwork belonging to the defendant, such as a certificate of completion of anger management and an official transcript for a GED test. RP 168-170. Mr. Campbell was unable to identify the intruder. RP 138-141. However, while Mr. Lowe told the police that he would not be able to identify the intruder even if he saw him again, once the matter came to trial, he claimed that he now remembered that the intruder was the defendant. RP 210-211.

On April 28, 2011, Officer Emilio Villagrann was called out to the defendant's mother's house in Longview on her complaint that the defendant was present and refused to leave. RP 244-248. Upon entry into the house, Officer Villagrann found the defendant and arrested him. *Id.* According to Officer Villagrann, the defendant had a box with him when arrested. *Id.* That box contained a phillips screwdriver, and wrench, and a file, all tools that "could be used" in a burglary. *Id.*

Procedural History

By information filed May 3, 2011, the Cowlitz County Prosecutor charged the defendant with one count of first degree burglary with a deadly weapon enhancement relating to the intrusion into Jennifer Herrman's house

on December 30, 2010, one count of residential burglary relating to the intrusion into Ashlee Rae's house on April 12, 2011, and one count of possession of burglary tools relating to the items in the defendant's possession upon his arrest on April 28, 2011. CP 1-2. Prior to trial, the defense moved to sever the two burglary counts on the argument that the evidence relating to each burglary charge would not properly be admitted in the trial of the other offense, and (2)that trying the two charges together would unfairly prejudice the defendant. CP 9-12. The defense also argued that failing to sever the two counts would improperly chill the defendant's constitutional right to testify on his own behalf and his right to remain silent because he did want to testify in regards to the allegations involving Count I but want to remain silent in regards to the allegations involving Count II. RP 1-3. Following a hearing, the court denied the motion. RP 22-25.

The case later came on for trial before a jury with the state calling 10 witnesses and the defense calling four. CP 33-257, 258-316. These witnesses testified to the facts set out in the preceding factual history. *See* Factual History. At the beginning of trial, the defendant unsuccessfully renewed the motion to sever counts. RP 26. The defendant again moved to sever at the end of the state's case and the court again denied the motion. RP 278-279.

One of the witnesses the state called was Longview Police Officer

Michael Watts, who had responded to the burglary call Mr. Campbell and Mr. Lowe made from Ms Ashley's house. RP 145-198. While on the witness stand, the state elicited the following evidence from Officer Watts: (1) that Officer Watts went to the defendant's mother's house on the night of the burglary and she told him that the defendant was not present, and (2) that he showed her a backpack, a shoe, and a knife he obtained from Ms Ashley's house and she identified it as belonging to the defendant. RP 177-185, 253. The defense did not object to this evidence as inadmissible hearsay. *Id.* The state also called Dorthea McKnight, the defendant's mother. RP 236-243. While on the witness stand, she denied that she had told the police that the backpack, the shoe, and the knife the officer showed her belonged to her son. *Id.* The defense did not object to her evidence on a claim that the state called her for the sole purpose of impeaching her with the prior statements the police claimed she made. *Id.*

Following the close of evidence, the court then instructed the jury without objection from either party. RP 318-319, CP 39-62. Counsel then presented closing arguments and the jury retired for deliberations, eventually returning guilty verdicts on all counts, along with a finding that the first offense had been committed with a deadly weapon. RP 338-415, 416-420; CP 63-66. The court later sentenced the defendant within the standard range and the defendant filed timely notice of appeal. CP 68-82, 84.

ARGUMENT

I. THE TRIAL COURT DENIED THE DEFENDANT HIS RIGHT TO A FAIR TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT WHEN IT FAILED TO GRANT A MOTION FOR SEVERANCE OF COUNTS AND THEREBY ALLOWED THE STATE TO PRESENT INADMISSIBLE, UNFAIRLY PREJUDICIAL EVIDENCE OF SIMILAR BAD ACTS.

While due process does not guarantee every person a perfect trial, *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968), both our state and federal constitutions do guarantee all defendants a fair trial, untainted from prejudicial evidence. *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963). As part of this right to a fair trial, a defendant is entitled to a severance of counts if the joinder of the counts is "so manifestly prejudicial as to outweigh the concern for judicial economy." *State v. Hoffman*, 116 Wn.2d 51, 804 P.2d 577 (1991). Under such circumstances in which the unfair prejudice outweighs the concern for judicial economy, the failure to grant a motion to sever requires reversal unless the state can prove that the error was harmless beyond a reasonable doubt. *State v. Mitchell*, 117 Wn.2d 521, 817 P.2d 898 (1991) (failure to grant severance held harmless beyond a reasonable doubt).

In determining whether or not the trial court's refusal to grant a severance of counts denied the defendant the right to a fair trial, the court

considers the following factors:

> Factors that tend to mitigate any prejudice from a joinder of counts include: (1) the strength of the State's evidence on each of the counts; (2) the clarity of the defenses on each count; (3) the propriety of the trial court's instruction to the jury regarding the consideration of evidence of each count separately; and (4) the admissibility of the evidence of the other crime. *Watkins*, 53 Wn.App. at 269, 766 P.2d 484; *State v. Gatalski*, 40 Wn.App. 601, 606-07, 699 P.2d 804, review denied, 104 Wash.2d 1019 (1985). These same factors are applied by reviewing courts to determine if a trial court's denial of a severance motion was unduly prejudicial. *State v. Eastabrook*, 58 Wn.App. 805, 812, 795 P.2d 151, *review denied*, 115 Wash.2d 1031, 803 P.2d 325 (1990).

State v. Cotten, 75 Wn.App. 669, 687, 879 P.2d 971 (1994).

As the court instructs in *State v. Cotton*, the first factor to consider when evaluating the trial court's refusal to sever counts is "the strength of the state's evidence on each count." In the case at bar, the state's evidence was much stronger on Count I that it was on Count II. In Count I the state had an eyewitness who told the police from her initial contact that she could identify the defendant. By contrast, the state's evidence was not as compelling on identification on Count II, particularly given the statements of the witnesses to the police that they had not seen the intruder well enough to identify him. Certainly the state had other evidence of identification on Count II by way of the paperwork, but the jury was certainly entitled to believe that the intruder in the second count had stolen that paperwork from the defendant. Thus, by failing to sever, the trial court allowed the state to use it's stronger

evidence on identification in Count I to improperly bolster it's weaker case on identification in Count II.

The second factor is the clarity of defense on each count. In this case, the defendant wanted to take the stand on his own behalf on Count I but was prevented because he wanted to exercise his right to silence on Count II. By failing to sever the counts in this case, the court made it near impossible for the jury to independently review the evidence in Count I and give the defendant a fair trial on this count because the court's ruling effectively prevented the defendant from testifying on his own behalf as to this charge.

The third factor is " the propriety of the trial court's instruction to the jury regarding the consideration of evidence of each count separately." In this case the trial court gave the following instruction on this point:

INSTRUCTION NO. 7

> A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

CP 48.

The deficiency in this instruction lies in its failure to instruct the jury that the evidence on each count should only be considered in rendering a verdict on that count. Thus, for example, the jury was free to use the evidence of the paperwork from Count II as evidence to support the conclusion that the defendant had at been the intruder some three months

previous on Count I. It would be impossible for almost any juror to ignore this type of evidence when considering separate issues of identify on the two counts because Instruction No. 7 does not require it. Thus, this one instruction falls miserably short in attempting to get the jury to parse out which evidence it could consider in Count I and which evidence it could consider in Count II.

The fourth factor this court should consider in determining the issue of severance of counts is "the admissibility of the evidence of the other crime." As concerns this fourth factor, it should be noted that none of the evidence concerning the burglary in Count I should have been admissible in Count II because it's sole purpose would have been to convince the jury that the defendant must have been guilty of burglary in Count II because the evidence in Count I showed the defendant's propensity to commit such a crime. It is fundamental under our adversarial system of criminal justice that "propensity" evidence, usually offered in the form of prior convictions or prior bad acts, is not admissible to prove the commission of a new offense. *See* 5 Karl B. Tegland, *Washington Practice, Evidence* § 114, at 383 (3d ed. 1989). This common law rule has been codified in ER 404(b) wherein it states that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Tegland puts this principle as follows:

> Rule 404(b) expresses the traditional rule that prior misconduct is inadmissible to show that the defendant is a "criminal type," and is thus likely to have committed the crime for which he or she is presently charged. The rule excludes prior crimes, regardless of whether they resulted in convictions. The rule likewise excludes acts that are merely unpopular or disgraceful.
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> Arrests of a mere accusations of crime are generally inadmissible, not so much on the basis of Rule 404(b), but simply because they are irrelevant and highly prejudicial.
>
> . . .
>
> The rule is a specialized version of Rule 403, based upon the belief that evidence of prior misconduct is likely to be highly prejudicial, and that it would be admitted only under limited circumstances, and then only when its probative value clearly outweighs its prejudicial effect.

5 Karl B. Tegland, *Washington Practice, Evidence* § 114, at 383-386 (3d ed. 1989).

Similarly, Tegland goes on to note that "the courts are reluctant to allow the State to prove the commission of a crime by evidence that the defendant was associated with persons or organizations known for illegal activities." 5 Karl B. Tegland, at 124.

For example, in *State v. Pogue*, 104 Wn.App. 981, 17 P.3d 1272 (2001), the defendant was charged with possession of cocaine after a police officer found crack cocaine in a car the defendant was driving. At trial, the defendant claimed that the car belonged to his sister, that it did not have drugs in it, and that the police must have planted the drugs. During cross-

examination, the state sought the court's permission to elicit evidence from the defendant concerning his 1992 conviction for delivery of cocaine. The court granted the state's request but limited the inquiry to whether or not the defendant had any familiarity with cocaine. The state then asked the defendant: "It's true that you have had cocaine in your possession in the past, isn't it?" The defendant responded in the affirmative.

The defendant was later convicted of the offense charged. On appeal, he argued that the trial court denied him a fair trial when it allowed the state to question him about his prior cocaine possession because this was propensity evidence. The state responded that the evidence was admissible to rebut the defendant's unwitting possession argument, as well as his police misconduct argument. First, the court noted that the defendant did not claim that he had knowingly possessed the cocaine without knowing what it was. Rather, he claimed that he didn't know the cocaine was in the car. Thus, the prior possession did not rebut this claim. Second, the court noted that there was no logical connection between prior possession and a claim that the police planted the evidence.

Finding error, the court then addressed the issue of prejudice. The court stated:

> The erroneous admission of ER 404(b) evidence requires reversal if there is a reasonable probability that the error materially affected the outcome. *State v. Halstien*, 122 Wn.2d 109, 127, 857 P.2d 270

> (1993). It is within reasonable probabilities that but for the evidence of Pogue's prior possession of drugs, the jury may have acquitted him.

State v. Pogue, 104 Wn.App. at 987-988.

Finding a "reasonable probability" that the error affected the outcome of the trial, the court reversed the conviction and remanded the case for a new trial.

In addition, even if the state can prove some relevance in evidence that has the tendency to convince the jury that the defendant was guilty because of his propensity to commit crimes such as the one charged, the trial court must still weigh the prejudicial effect of that evidence under ER 403. This rule states:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

ER 403.

In weighing the admissibility of evidence under ER 403 to determine whether the danger of unfair prejudice substantially outweighs probative value, a court should consider the importance of the fact that the evidence is intended to prove, the strength and length of the chain of inferences necessary to establish the fact, whether the fact is disputed, the availability of alternative means of proof, and the potential effectiveness of a limiting

instruction. *State v. Kendrick*, 47 Wn.App. 620, 736 P.2d 1079 (1987). In Graham's treatise on the equivalent federal rule, it states that the court should consider:

> the importance of the fact of consequence for which the evidence is offered in the context of the litigation, the strength and length of the chain of inferences necessary to establish the fact of consequence, the availability of alternative means of proof, whether the fact of consequence for which the evidence is offered is being disputed, and, where appropriate, the potential effectiveness of a limiting instruction....

M. Graham, Federal Evidence § 403.1, at 180-81 (2d ed. 1986) (quoted in *State v. Kendrick*, 47 Wn.App. at 629).

The decision whether or not to exclude evidence under this rule lies within the sound discretion of the trial court and will not be overturned absent an abuse of that discretion. *State v. Baldwin*, 109 Wn.App. 516, 37 P.3d 1220 (2001). An abuse of discretion occurs when the trial court's exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Neal*, 144 Wn.2d 600, 30 P.3d 1255 (2001).

For example, in *State v. Acosta*, 123 Wn.App. 424, 98 P.3d 503 (2004), Acosta was charged with first degree robbery, second degree theft, taking a motor vehicle, and possession of methamphetamine. At trial, the defense argued diminished capacity and called an expert witness to support the claim. The state countered with its own expert, who testified that the defendant suffered from anti-social personality disorder but not diminished

capacity. In support of this opinion, the state's expert testified that he relied in part upon the defendant's criminal history as contained in his NCIC. During direct examination of the expert, the court allowed the expert to recite the defendant's criminal history to the jury. Following conviction, Acosta appealed arguing in part that the trial court had erred when it admitted his criminal history because even if relevant it was more prejudicial than probative under ER 403.

On review the Court of Appeals addressed the issue of the relevance of the criminal history. The court then held:

> Testimony regarding unproved charges, and convictions at least ten years old do not assist the jury in determining any consequential fact in this case. Instead, the testimony informed the jury of Acosta's criminal past and established that he had committed the same crimes for which he was currently on trial many times in the past. Dr. Gleyzer's listing of Acosta's arrests and convictions indicated his bad character, which is inadmissible to show conformity, and highly prejudicial. ER 404(a). And the relative probative value of this testimony is far outweighed by its potential for jury prejudice. ER 403.

State v. Acosta, 123 Wn.App. at 426 (footnote omitted).

The decision in *State v. Escalona*, 49 Wn.App. 251, 742 P.2d 190 (1987) also explains why evidence of similar crimes denies a defendant the right to a fair trial. In *Escalona*, the defendant was charged with Second Degree Assault while armed with a deadly weapon, in that he allegedly threatened another person with a knife. In fact, Defendant had a prior

conviction for this very crime, and prior to trial the court had granted a defense motion to exclude any mention of this conviction. During cross-examination, defense counsel asked the complaining witness about a prior incident in which four people (not including the defendant) had assaulted him, and whether or not he was nervous on the day of the incident then before the court. The complaining witness responded: "This is not the problem. Alberto [the defendant] already has a record and had stabbed someone." *State v. Escalona*, 49 Wn.App. at 253. After this comment, defense counsel moved for a limiting instruction, which the court gave, and then moved for a mistrial, which was denied. Following conviction, defendant appealed, arguing that the court abused its discretion in refusing to grant his motion for mistrial.

In addressing this issue, the court recognized the following standard:

> In looking at a trial irregularity to determine whether it may have influenced the jury, the court [in *State v. Weber*, 99 Wn.2d 158, 164-65, 659 P.2d 1102 (1983)], considered, without setting for a specific test, (1) the seriousness of the irregularity, (2) whether the statement in question was cumulative of other evidence properly admitted, and (3) whether the irregularity could be cured by an instruction to disregard the remark, an instruction the jury is presumed to follow.

State v. Escalona, 49 Wn.App. at 254.

In analyzing the defendant's claim under this standard, the court first found that the error was "extremely serious" in light of the fact that it was inadmissible under either ER 404(b) or ER 609, and particularly in light of

the "paucity of credible evidence against [the defendant]" and the inconsistencies in the complaining witness's allegations, which almost constituted the state's entire case. Similarly, the court had no problem under the second *Weber* criterion finding that the statement was not cumulative of other properly admitted evidence, since the trial court had specifically prohibited its use.

As concerned the last criterion, the court stated:

> There is no question that the evidence of Escalona's prior conviction for having "stabbed someone" was "inherently prejudicial." *See State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982). The information imparted by the statement was also of a nature likely to "impress itself upon the minds of the jurors" since Escalona's prior conduct, although not "legally relevant," appears to be "logically relevant." *See State v. Holmes*, 43 Wn.App. 397, 399-400, 717 P.2d 766, *review denied*, 106 Wn.2d 1003 (1986). As such, despite the court's admonition, it would be extremely difficult, if not impossible, in this close case for the jury to ignore this seemingly relevant fact. Furthermore, the jury undoubtedly would use it for its most improper purpose, that is, to conclude that Escalona acted on this occasion in conformity with the assaultive character he demonstrated in the past. *See Saltarelli*, 98 Wn.2d at 362.
>
> While we recognize that in the determination of whether a mistrial should have been granted, "[e]ach case must rest upon its own facts," *[State v.] Morsette*, [7 Wn.App. 783, 789, 502 P.2d 1234 (1972) (quoting *State v. Albutt*, 99 Wash. 253, 259, 169 P.2d 584 (1917)), the seriousness of the irregularity here, combined with the weakness of the State's case and the logical relevance of the statement, leads to the conclusion that the court's instruction could not cure the prejudicial effect of [the alleged victim's] statement. Accordingly, under the factors outlined in *Weber*, we hold that the trial court abused its discretion in denying Escalona's motion for mistrial.

State v. Escalona, 49 Wn.App. at 255-56.

The decisions in *Pogue, Acosta* and *Escalona* each explain the unfair prejudice that arises in the minds of the jury when the state is allowed to elicit evidence that the defendant previously committed the same type of crime with which he is now charged. The case at bar presents another example of this unfair prejudice. As in *Pogue, Acosta* and *Escalona,* the inadmissible evidence of prior offenses (the evidence from Count I in this case when considered in deciding Count II) denied the defendant his right to a fair trial. Thus, under the four factors listed in *Cotton,* the trial court denied the defendant his right to a fair trial when it denied the defendant's motion to sever counts.

II. TRIAL COUNSEL'S FAILURE TO OBJECT WHEN THE STATE ELICITED INADMISSIBLE, PREJUDICIAL HEARSAY DENIED THE DEFENDANT EFFECTIVE ASSISTANCE OF COUNSEL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22, AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT.

Under both United States Constitution, Sixth Amendment, and Washington Constitution, Article 1, § 22, the defendant in any criminal prosecution is entitled to effective assistance of counsel. The standard for judging claims of ineffective assistance of counsel under the Sixth Amendment is "whether counsel's conduct so undermined the proper functioning of the adversary process that the trial cannot be relied on as

having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). In determining whether counsel's assistance has met this standard, the Supreme Court has set a two part test.

First, a convicted defendant must show that trial counsel's performance fell below that required of a reasonably competent defense attorney. Second, the convicted defendant must then go on to show that counsel's conduct caused prejudice. *Strickland*, 466 U.S. at 687, 80 L.Ed.2d at 693, 104 S.Ct. at 2064-65. The test for prejudice is "whether there is a reasonable probability that, but for counsel's errors, the result in the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Church v. Kinchelse*, 767 F.2d 639, 643 (9th Cir. 1985) (citing *Strickland*, 466 U.S. at 694, 80 L.Ed.2d at 698, 104 S.Ct. at 2068). In essence, the standard under the Washington Constitution is identical. *State v. Cobb*, 22 Wn.App. 221, 589 P.2d 297 (1978) (counsel must have failed to act as a reasonably prudent attorney); *State v. Johnson*, 29 Wn.App. 807, 631 P.2d 413 (1981) (counsel's ineffective assistance must have caused prejudice to client).

In the case at bar, the defendant claims ineffective assistance based upon trial counsel's failure to object when the state elicited evidence from Officer Watts that (1) he went to the defendant's mother's house on the night of the burglary and she told him that the defendant was not present, and (2)

that the officer showed her a backpack, a shoe, and a knife he obtained from Ms Ashley's house and the defendant's mother identified it as belonging to the defendant. RP 177-185, 253. In addition, as the following explains, this evidence was not even admissible in rebuttal because the state's sole purpose in calling the defendant's mother in its case-in-chief was to impeach her claim on direct that she had not identified these items. Additionally, trial counsel's failure to object to her evidence also denied the defendant effective assistance of counsel. The following sets out this argument.

Under ER 802, hearsay "is not admissible except as provided by these rules, by other court rules, or by statute." Under ER 801(c) hearsay is defined as follows:

> (c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

ER 801(c).

The phrase "other than one made by the declarant while testifying at the trial or hearing" includes an out-of-court statement made by an in-court witness. *State v. Sua*, 115 Wn.App. 29, 60 P.3d 1234 (2003). Evidence Rule 801(d)(1) provides an exception under which prior inconsistent statements may be admitted as substantive evidence. This rule states:

> (d) Statements Which Are Not Hearsay. A statement is not hearsay if –

> (1) Prior Statement by Witness. The declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is (i) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (ii) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (iii) one of identification of a person made after perceiving the person;

ER 801(d)(1)(i).

In order for a statement to qualify under ER 801(d)(1)(i), it must be "given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding." In the case at bar, the state did not argue that Dorthea McKnight's prior statements had been "given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding." Thus, they were not admissible as substantive evidence. However, they were potentially admissible to impeach her testimony. Under ER 607 "the credibility of a witness may be attacked by any party, including the party calling the witness." However, "'a prosecutor may not use impeachment as a guise for submitting to the jury substantive evidence that is otherwise unavailable.'" *State v. Babich*, 68 Wn.App. 438, 444, 842 P.2d 1053 (quoting *United States v. Silverstein*, 737 F.2d 864, 868 (10th Cir.1984)),*review denied*, 121 Wn.2d 1015, 854 P.2d 42 (1993). This principle is discussed in detail in *State v. Lavaris*, 106 Wash.2d 340, 721 P.2d 515 (1986).

In *Lavaris* the defendant's confession to murder was admitted at his

first trial. On appeal the Supreme Court reversed, holding that the trial court had erred when it failed to exclude that confession, which had been obtained unlawfully. On retrial, the state called a witness named Castro who testified to the circumstances leading up to the killing. However, he also testified that he was not at the scene of the crime the night before the murder; that he did not remember seeing anyone at the scene of the killing, and that he had not been present when anyone was killed. The trial court then allowed the state to impeach him with his own prior inconsistent statements which incriminated the defendant. Following his second conviction the defendant appealed, arguing that the trial court had erred when it allowed the state to impeach as a guise for introducing otherwise inadmissible evidence.

However, the Supreme Court affirmed, finding that (1) the substantive evidence of the witness was essential in many areas of the State's case, and (2) the State did not call the witness for the primary purpose of impeaching him with testimony that would have been otherwise inadmissible.

By contrast, in the case at bar, the slight substantive evidence that Dorthea McKnight presented when called as a witness was far from essential to the state's case. In addition, any fair review of Dorthea McKnight's testimony reveals that the state's sole purpose in calling her was to present otherwise inadmissible impeachment evidence of her prior statements. First,

although Dorthea McKnight was ostensibly the state's witness, the prosecutor's questioning was much more akin to cross-examination than it was direct examination. Second, the majority of this examination involves the state impeaching her with her prior inconsistent statements that incriminated the defendant. The conclusions to be drawn from a fair review of her testimony is that the state called Dorthea McKnight for one purpose only: to impeach her with prior inconsistent statements and then use those statements substantively.

In addition to calling Dorthea McKnight for the sole purpose of impeaching her with her prior inconsistent statements, the state took this action one step further and argued substantively from this evidence. During closing, the state argued that since the defendant's mother had identified the backpack, shoe and knife as belonging to the defendant, that identification proved that the defendant had been the intruder in Count II. *See* RP 367. The state repeated this argument in rebuttal. *See* RP 401.

In this case there was no possible tactical reason for the defendant's attorney to fail to object to the admission Officer Watts's testimony, Dorthea McKnight's testimony or the state's substantive arguments from that testimony. The defense presented was one solely of mistaken identity and there was evidence to support this argument in both counts. The witnesses did not get a good view of the intruder and were inconsistent in their claims

that the defendant was that intruder. Under these facts, no reasonable defense attorney would fail to object to the presentation of this inadmissible, prejudicial evidence when a proper objection would have kept it from being admitted. Thus, trial counsel's failure fell below the standard of a reasonably prudent attorney.

In addition, for the reasons stated above there is a very real likelihood that, but for counsel's failure to object, the jury would have acquitted. As was just mentioned, the state's case rested solely upon the identification of the state's witnesses. There were no admissions from the defendant. Thus, trial counsel's failure to object also caused prejudice, thereby denying the defendant his right to effective assistance of counsel under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment. As a result, the defendant is entitled to a new trial.

III. THE TRIAL COURT DENIED THE DEFENDANT DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, WHEN IT SENTENCED HIM FOR AN OFFENSE UNSUPPORTED BY SUBSTANTIAL EVIDENCE.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073,

25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: "[The] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law." *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn.App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. Id. In addition, evidence that is equally consistent with innocence as it is with guilt is not sufficient to support a conviction; it is not substantial evidence. *State v. Aten*, 130 Wn.2d 640, 927 P.2d 210 (1996).

"Substantial evidence" in the context of a criminal case means evidence sufficient to persuade "an unprejudiced thinking mind of the truth of the fact to which the evidence is directed." *State v. Taplin*, 9 Wn.App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227, 228 (1970)). The test for determining the sufficiency of the evidence is whether "after viewing the evidence in the light most favorable to the prosecution any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979).

In this case, the state charged the defendant in Count III with making or having burglary tools under RCW 9A.52.060(1). This statute states as follows:

> (1) Every person who shall make or mend or cause to be made or mended, or have in his or her possession, any engine, machine, took, false key, pick lock, but, nippers, or implement adapted, designed, or commonly used for the commission of burglary under circumstances evincing an intent to use or employ, or allow the same to be used or employed in the commission of a burglary, or knowing that the same is intend to be so used, shall be guilty of making or having burglar tools.

RCW 9A.56.060(1).

The gravamen of this offense is to make, modify or possess any tool "under circumstances evincing an intent to use or employ" that tool "in the commission of a burglary." In the case at bar, the state presented evidence that when the defendant was arrested at his mother's house, he had some tools in his possession. Specifically, he had a phillips screwdriver, a wrench, and a file, all contained in a box. *See* RP 244-248. While the arresting officer opined that each of these tools "could be used" in a burglary, one would be hard pressed to imagine a small hand tool that "couldn't be used" in a burglary. In asking this question of the officer, the state revealed the real deficiency in the state's case on this alleged offense, which was the lack of any "circumstances evincing an intent to use or employ" those tools in the commission of a burglary. When arrested, the defendant was in his mother's

house. While she did not want him at that location and while she called the police to eject him, these facts do not support a logical inference that the defendant possessed the screwdriver, wrench and file with the intent to commit a burglary with them. Consequently, substantial evidence does not support this essential element of this offense, and the trial court erred when it accepted the jury's verdict on Count III.

CONCLUSION

The trial court's failure to grant the defendant's motion to sever counts denied the defendant a fair trial, and trial counsel's failure to object to the admission of irrelevant, prejudicial evidence denied the defendant effective assistance of counsel. As a result, this court should reverse the defendant's convictions for burglary and remand for a new trial. In addition, since substantial evidence does not support all of the necessary elements on Count III, this court should vacate that conviction and remand with instructions to dismiss that count with prejudice.

DATED this 12th day of March, 2012.

Respectfully submitted,

John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

WASHINGTON CONSTITUTION
ARTICLE 1, § 3

No person shall be deprived of life, liberty, or property, without due process of law.

WASHINGTON CONSTITUTION
ARTICLE 1, § 22

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

UNITED STATES CONSTITUTION,
SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

. . .

RCW 9A.52.060
Making or Having Burglar Tools

(1) Every person who shall make or mend or cause to be made or mended, or have in his or her possession, any engine, machine, took, false key, pick lock, but, nippers, or implement adapted, designed, or commonly used for the commission of burglary under circumstances evincing an intent to use or employ, or allow the same to be used or employed in the commission of a burglary, or knowing that the same is intend to be so used, shall be guilty of making or having burglar tools.

(2) Making or having burglar tools is a gross misdemeanor.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON - DIVISION II

STATE OF WASHINGTON, **Respondent,**	**NO. 42376-6-II**
vs.	**AFFIRMATION OF SERVICE**
DONALD DAVID MCKNIGHT, **Appellant.**	

STATE OF WASHINGTON)
) : ss.
County of Clark)

DONNA BAKER, states the following under penalty of perjury under the laws of Washington State. That at all times herein mentioned I was and now am a citizen of the United States and resident of the State of Washington, over the age of eighteen and competent to be a witness and make service herein.

On March 12TH, 2012, I personally e-filed and/or placed in the mail the following documents

1. BRIEF OF APPELLANT
2. AFFIRMATION OF SERVICE

to the following:

SUSAN BAUR COWLITZ COUNTY PROS ATTY 312 S.W. FIRST AVE. KELSO, WA. 98626	Donald D. McKnight-DOC 867258 Echo East 11 Washington State Penitentiary 1313 N. 13th Ave. Walla Wallla, WA. 99362

Dated this 12TH, day of MARCH, 2012 at LONGVIEW, Washington.

/S/

Donna Baker

Legal Assistant to John A. Hays

HAYS LAW OFFICE

March 12, 2012 - 3:25 PM

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Case Name: State vs Donald David McKnight

Court of Appeals Case Number: 42376-6

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